

APPEAL NO. 022452
FILED NOVEMBER 6, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 15, 2002, with the record closing on August 29, 2002. With regard to the only issue before her, the hearing officer determined that the (decedent) was not in the course and scope of his employment when he was fatally injured in a motor vehicle accident (MVA) on _____.

The appellant (claimant beneficiary) claimant appeals various of the hearing officer's determinations, asserting that the decedent "was acting within the scope of his employment duties and was acting in furtherance of the business and affairs of his employer" and seeks reversal of the hearing officer's decision. The respondent (carrier) responds, urging affirmance.

DECISION

Reversed and remanded.

It is undisputed that the decedent was a senior roofing foreman working on a job in (state 1). It is also undisputed that the job was temporarily suspended because of a funding problem and that after finishing a portion of the job on (day preceding date of injury), the decedent and his crew of 18 workers, of which many, if not most, were from Mexico, gassed up three vehicles belonging to the roofing company in the early morning hours of _____, and started to return to Texas. Also undisputed is that a van carrying 12 of the workers was involved in a MVA in which the decedent and another worker (not at issue here) died, with others sustaining injuries. In dispute is the purpose of the trip back to Texas. The claimant's beneficiary and most of the roofing company executives testified that the decedent and his crew were on their way to a big job in (city 1), Texas. The carrier argues that the decedent and his crew were returning to Texas to take some time off to rest and be with their families.

In deciding the issue, the hearing officer and the carrier point to statements made by RM, an executive of the roofing company and in charge of all manpower in the field, and by DG, the decedent's brother-in-law and driver of the van. Both testified at the CCH. RM testified that the decedent and his crew were being routed to an (city 1) job site because of the temporary shut down of the (state 1) job. RM conceded that on October 1, 2001, he had met with an insurance adjuster and advised the adjuster that the purpose of the trip was for the workers to return to visit families and to take a few days off and that he did not believe the decedent was covered by workers' compensation because he was not being paid for the trip home (also a fact in dispute). DG testified both that the decedent told him on (day preceding date of injury), "we were going to be back to work over in (city 1)" and that he was going to spend time with his family (DG was not married and lived with the decedent and the claimant's beneficiary).

The hearing officer quotes from a sentence in DG's recorded statement which had the following exchange:

Q: When you left (state 1) and were driving the van, why did you and the other work, member of the work crew leave (state 1) on _____.

A: We were coming home to see our family.

Q: Okay and how long were you going to stay home?

A: We were just going to stay there, we return back to work Monday and come back that Sunday, back to (state 1).

Q: Back to (state 1) on the following Sunday?

A: Um hum (Yes)

Testimony from the decedent's widow, a vice president from the roofing company, the roofing company secretary/treasurer, an executive of the (state 1) roofing company, and the general manager of the (city 1) roofing company all testified that the decedent and his crew were being transferred from (state 1) to work on the (city 1) job.

The hearing officer cited the provisions of Section 401.011(12), found that because the decedent was traveling in a company van that the exception to the "going and coming" rule in Section 401.011(12)(A)(i) applies, but concluded that the decedent was "not engaged in or about the furtherance of the affairs or business of the [e]mployer." The hearing officer correctly recites that for the exception of Section 401.011(12)(A)(i) to apply the decedent must also have been in the furtherance of the employer's business.

The hearing officer commented:

This case is a true question of credibility. The preponderance of the credible evidence is that Decedent and his crew had reached a stopping point on the (state 1) job site, and were returning to (city 1) for rest and to take some time off before returning to the (state 1) job site. This is clear from the recorded interview given from [DG], in the presence of his attorney, shortly after the accident, as well as prior inconsistent statements made by [RM], shortly after the fatal accident.

* * * *

Decedent was merely going home for personal reasons at the time of the fatal accident, and was not engaged in or about the furtherance of the affairs or business of the Employer. I did not find the statements that

Decedent was returning to the (city 1) area in order to begin work on an (city 1) roofing job credible. Therefore, the determination must be made that Decedent was not in the course and scope of his employment when fatally injured in a [MVA] on _____.

We acknowledge that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. We further acknowledge that it is within the sole province of the hearing officer to decide which of RM's inconsistent statements she wished to believe and how to interpret DG's statement. That being said, we fail to understand why the decedent would take his whole 18-man crew with him when he was going back to Texas, and when the uncontroverted testimony was that none of the rest of the crew lived in (city 1) or for that matter Texas. Why would the 18 -man crew be going back to Texas just to rest when they could rest just as well in (state 1)?

We remand the case for the hearing officer to reconsider all of the evidence and comment on her interpretation of why the whole crew was returning to Texas in the employer provided vehicles when none of the crew, other than the decedent and his brother-in-law who lived with him, lived in Texas

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **ADVANTAGE WORKERS' COMPENSATION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Margaret L. Turner
Appeals Judge